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No. 82-790

In The

Supreme Court of the United States

October Term, 1982

RICHARD BARTEL,

Petitioner,

vs.

JOHNSON COUNTY AND THE JOHNSON COUNTY BOARD OF SUPERVISORS, et al.,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF IOWA

RESPONDENT'S BRIEF IN OPPOSITION

J. PATRICK WHITE
First Assistant County Attorney

328 South Clinton Street
P. O. Box 2450
Iowa City, Iowa 52244-2450

Attorney for Respondents

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTION PRESENTED FOR REVIEW

Is a County legally obligated to pay the Attorney Fees and costs incurred by a winning candidate in a county election contest, and in derivative lawsuits, where the candidate's eligibility for office was at issue in the contest proceedings and there is no statutory provision allowing the award?

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The Respondents, Johnson County and the Johnson County Board of Supervisors, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the Iowa Court of Appeals in this case.

AUTHORITIES AND ARGUMENT

1. The Court below fully considered and correctly decided the issues. No fund or other public benefit resulted from Petitioner's defense of the election contest as would give rise to an implied trust or a right to the services of a private county attorney. Cases relied upon by Petitioner are clearly distinguishable on their facts.

2. This case does not present important questions of federal constitutional law. Plaintiff was vindicating a personal right in the election contest not the franchise interests of the electorate.

The Iowa Court of Appeals did not err in denying recovery of attorney fees and costs under theories of "implied trust" and "private county attorney". No fund or other public benefit resulted from petitioner's defense of the election contest as would give rise to an implied trust. Petitioner defended in the election contest for his own benefit, not for the benefit of the people of Johnson County.

Cases relied upon by Petitioner are clearly distinguishable on their facts. Unlike the case of *Devine v. Wonderlich*, 260 N. W. 2d 620, 623 (Iowa 1978), the issue in Petitioner's election contest was not whether certain votes should be counted, but whether Petitioner, Mr. Bartel, was statutorily qualified to be on the ballot in the first place. By defending in the contest action, Petitioner was not vindicating the franchise interest of the electorate. The public has no interest in defending an individual against charges that he is statutorily disqualified from holding office.

Petitioner's reliance on *Mills v. Electric Auto-Lite Co.*, 396 U. S. 375, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970), is similarly misplaced. In *Mills*, all shareholders in the corporation benefited in the same manner as the plaintiff in being afforded a means of enforcing the proxy statute. Unlike the plaintiff in *Mills*, Petitioner in the instant case did not benefit in the same manner as the electorate of Johnson County. The Iowa Court of Appeals correctly pointed out that Petitioner was the only one capable of holding office, and the fact that he was holding office conferred benefits upon him that were not shared by those who elected him. The interests of the electorate and those of the Petitioner were not identical.

This Court's decision in *Alyeska Pipeline Serv. v. Wilderness Soc.*, 421 U. S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975), disposes of Petitioner's argument for recovery of attorney fees based on a theory of "private county attorney". In *Alyeska*, this Court discussed the rule that attorney fees are not ordinarily recoverable as costs. Only three non-statutory exceptions were recognized: (1) an implied trust, (2) willful disobedience to a court order, and (3) action by the losing party in bad faith, vexatiously or for oppressive reasons. None of these exceptions apply to Petitioner's case.

Petitioner requests that this Court consider his claim based on criteria set out in *Serrano v. Priest*, 569 P. 2d 1303, 1314, 141 Cal. Rptr. 315, 326 (1977). Even considered under his own criteria, Petitioner's case fails. Petitioner was not vindicating a strong or socially important public policy as is required by *Serrano*. He was merely defending his personal qualifications to hold office. Be-

cause there is no statute authorizing the award of attorney fees for the defense of the election contest, and because Petitioner failed to satisfy any of the non-statutory exceptions to the general rule, Petitioner had no right to the services of a "private county attorney".

Petitioner's defense of the election contest was not a defense of the franchise interests of the electorate. What was at issue in the election contest was whether Petitioner personally was qualified to serve in the official capacity of a County Supervisor. It was not the political will of the voters that was challenged. Petitioner was a private citizen defending his election to public office. If the Court below had found that Petitioner was statutorily disqualified from holding office, he would have been removed from office regardless of the plurality of votes that he received. This Court has, of course, deemed the political franchise fundamental to democratic government. *Wesberry v. Sanders,* 376 U. S. 1, 17-18, 84 S. Ct. 526, 11 L. Ed. 2d 481 (1964). However, Petitioner's personal qualification under statute, not the political franchise interests of the people, was the matter at issue. Therefore, no question of federal constitutional law is presented.

CONCLUSION

For the reasons set forth above, this Court should deny the request for a writ of certiorari.

Respectfully submitted,

J. Patrick White
First Assistant County Attorney
328 South Clinton Street
P. O. Box 2450
Iowa City, Iowa 52244-2450
Attorney for Respondents